U.S. Court of International Trade

Slip Op. 18–64

CSC SUGAR LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 17–00214

[Plaintiff's motion to complete the administrative record is granted in part and denied in part.]

Dated: June 1, 2018

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Alexander O. Canizares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC for Defendant United States. With him on the brief was *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Khalil Gharbieh*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Robert Charles Cassidy, Jr., Charles S. Levy, James R. Cannon, Jr., Jonathan M. Zielinsky, and *Nina R. Tandon*, Cassidy Levy Kent (USA) LLP, of Washington, DC for Defendant-Intervenors the American Sugar Coalition, American Sugar Cane League, American Sugarbeet Growers Association, American Sugar Refining, Inc., Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and the United States Beet Sugar Association.

Rosa S. Jeong and *Irwin P. Altschuler*, Greenberg Traurig, LLP, of Washington, DC for Defendant-Intervenor Cámara Nacional de Las Industrias Azucarera y Alcoholera.

Gregory J. Spak, Kristina Zissis, and *Ron Kendler*, White & Case LLP, of Washington, DC for Defendant-Intervenor Imperial Sugar Company.

Stephan E. Becker and *Sahar J. Hafeez*, Pillsbury Winthrop Shaw Pittman, LLP, of Washington, DC for Defendant-Intervenor Government of Mexico.

OPINION AND ORDER

Gordon, Judge:

Before the court is the motion of Plaintiff CSC Sugar LLC ("Plaintiff" or "CSC Sugar") to complete the administrative record filed by the U.S. Department of Commerce ("Commerce") in this action challenging Commerce's determination to amend the suspension agreement regarding the countervailing duty investigation on *Sugar From Mexico. See Sugar from Mexico*, 82 Fed. Reg. 31,942, PD 95[1] (Dep't of Commerce July 11, 2017) (amendment to the CVD Suspension Agreement) ("CVD Amendment"); Pl.'s Mot. to Complete Admin. R., ECF

[1] "PD ___" refers to a document contained in the public administrative record, which is found in ECF No. 33–1, unless otherwise noted. "CD ___" refers to a document contained in the confidential administrative record, which is found in ECF No. 33–2, unless otherwise noted.

Nos. 36 & 37 ("Pl.'s Mot."); *see also* Def.'s Resp. to Pl.'s Mot. to Complete Admin. R., ECF No. 51 ("Def.'s Resp."); Def.-Intervenor Cámara Nacional de Las Industrias Azucarera y Alcoholera Resp. Opp. Pl.'s Mot. to Complete Admin R., ECF No. 49 ("Cámara Resp."); Def.-Intervenors American Sugar Coalition, American Sugar Cane League, American Sugarbeet Growers Association, American Sugar Refining, Inc., Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and the United States Beet Sugar Association's Resp. Opp. Pl.'s Mot. to Complete Admin R., ECF No. 50 ("ASC Resp."); Def.-Intervenor Gov't of Mexico Resp. Opp. Pl.'s Mot. to Complete Admin R., ECF No. 48; Pl.'s Reply in Supp. of Mot. to Complete Admin. R., ECF No. 55 ("Pl.'s Reply"). The court has jurisdiction over this matter pursuant to Section 516A(a)(2)(B)(iv) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iv), and 28 U.S.C. § 1581(c) (2012).[2] For the reasons set forth below, the court grants Plaintiff's Motion to Complete the Administrative Record in part and denies it in part.

I. Background

In 2014, after the American Sugar Coalition, and its members (collectively, "ASC"), filed a petition with Commerce and the U.S. International Trade Commission ("ITC"), the agencies conducted an investigation as to whether imports of sugar from Mexico were being subsidized, and whether such imports were injurious to the U.S. industry. Commerce preliminarily determined that countervailable subsidies were being supplied to producers and exporters of sugar from Mexico. *See Sugar From Mexico: Preliminary Affirmative Countervailing Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination*, 79 Fed. Reg. 51,956 (Dep't of Commerce Sept. 2, 2014). Commerce and the Government of Mexico subsequently signed a suspension agreement. *See Sugar From Mexico: Suspension of Countervailing Duty Investigation*, 79 Fed. Reg. 78,044 (Dep't of Commerce Dec. 29, 2014) ("CVD Suspension Agreement").

In January 2015, Imperial Sugar Company and AmCane Sugar LLC, requested a review by the ITC of the CVD Suspension Agreement to determine whether that agreement had completely eliminated the injurious effects of imports of sugar from Mexico. *See Sugar from Mexico: Continuation of Antidumping and Countervailing Duty Investigations*, 80 Fed. Reg. 25,278, 25,280 (Dep't of Commerce May

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

4, 2015). Thereafter, the ITC concluded that the CVD Suspension Agreement had indeed eliminated completely the injurious effects of imports of sugar from Mexico. *Id.*

In early 2016, Imperial Sugar, AmCane, and ASC requested that Commerce initiate an administrative review of the CVD Suspension Agreement covering the period from December 19, 2014 to December 31, 2014. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 6,832, 6,839 & n.9 (Dep't of Commerce Feb. 9, 2016). During the pendency of the administrative review, the United States began direct negotiations with both the Government of Mexico and producers and exporters of sugar from Mexico regarding possible amendment of the CVD Suspension Agreement. On March 9, 2017, the U.S. Secretary of Commerce met with his Mexican counterpart to announce "a new round of negotiations regarding the serious issues identified with the functioning of the current [suspension] agreements on sugar from Mexico." *Sugar from Mexico: Meeting with Secretary Wilbur Ross*, PD 58 (Dep't of Commerce Apr. 4, 2017). Commerce then notified representatives of Mexican producers and exporters of sugar and the Government of Mexico that Commerce intended to terminate the CVD Suspension Agreement on June 5, 2017, unless a revised agreement was reached by that date, citing "outstanding issues between the parties." *See* Letter from Commerce to Gov't of Mexico re: termination of CVD Suspension Agreement, PD 59 (May 1, 2017).

By mid-June 2017, Commerce and the Government of Mexico had reached agreement on these issues and initialed draft amendments to the CVD Suspension Agreement. The draft amendments proposed, among other items, that the definition of "refined sugar" be changed to 99.2 degrees polarity, even though 99.5 degrees polarity had been the definition since the investigation began in 2014. *See* Pl.'s Mot. at 3–4.

In keeping with the notice and comment requirements of 19 U.S.C. § 1671c(e)(3), Commerce invited interested parties to comment on the draft amendments as well as draft memoranda explaining how the revisions to the CVD Suspension Agreement met the relevant statutory requirements. *See* Def.'s Resp. at 6–7. After considering comments from interested parties, Commerce, on June 30, 2017, signed final amendments to the CVD Suspension Agreement. CVD Amendment, 82, Fed. Reg. at 31,942. In August 2017, Commerce released final memoranda explaining how the amended agreement met the relevant statutory requirements, and addressing individual com-

ments from the parties. *See* Def.'s Resp. at 7 (citing explanatory memoranda available at PD 101–103). Subsequently, CSC Sugar commenced this action, challenging Commerce's amendment to the CVD Suspension Agreement. *See* Compl., ECF No. 11. Commerce then filed the administrative record that was in turn followed by Plaintiff's motion to complete the record. *See* Admin. R. Index, ECF No. 33; *see also* Pl.'s Mot.

II. Standard of Review

"Where an agency presents a certified copy of the complete administrative record, as was done in this case, 'the court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary.'" *Defenders of Wildlife v. Dalton*, 24 CIT 1116, 1119 (2000) (quoting *Ammex, Inc. v. United States*, 23 CIT 549, 555, 62 F. Supp. 2d 1148, 1156 (1999)). To prevail on "a motion to complete the administrative record, 'a party must do more than simply allege that the record is incomplete. Rather, a party must provide the Court with reasonable, non-speculative grounds to believe that materials considered in the decision-making process are not included in the record.'" *Id.* (quoting *Ammex*, 23 CIT at 556, 62 F. Supp. 2d at 1156–57).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the countervailing duty statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (An agency's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

III. Discussion

CSC Sugar contends that Commerce did not meet its obligation to file a complete administrative record with the court as required by 19 U.S.C. § 1516a(b)(2)(A)(i) and USCIT Rule 73.2(a). *See* Pl.'s Mot. at 10–11. Specifically, Plaintiff argues that Commerce failed to memorialize and include in the record ex parte communications between Commerce officials and interested parties (including the domestic sugar industry and representatives of Mexico) as required by 19 U.S.C. § 1677f(a)(3). *Id.* at 7–11. In support of its contention, Plaintiff relies on a *Financial Times* article dated May 31, 2017 that specifically reports on phone calls in May 2017 between the U.S. Secretary of Commerce, U.S. sugar industry representatives, and Mexican sugar industry representatives regarding negotiations to amend the CVD Suspension Agreement. *See* Pl.'s Mot. at Ex. 2 ("*Financial Times* article").

The Government does not dispute that these ex parte calls occurred. *See generally* Def.'s Resp. Given this, Plaintiff maintains that under the plain language of §§ 1516a(b)(2) and 1677f(a)(3), Commerce failed to provide the court with the requisite complete "copy of all information presented to or obtained by [Commerce] ... including ... the record of ex parte meetings required to be kept by section 1677f(a)(3)." *See* 19 U.S.C. § 1516a(b)(2)(A)(i); *accord* USCIT R. 73.2(a)(1); *see also* 19 U.S.C. § 1677f(a)(3). In response, the Government contends that Plaintiff's argument is fundamentally flawed because Commerce was not required to maintain records of ex parte meetings that occurred during the course of suspension agreement negotiations. *See generally* Def.'s Resp. at 11–26. Specifically, the Government maintains that § 1516(b)(2) and § 1677f(a)(3)'s requirements do not apply to negotiations of a suspension agreement or amendments. The Government further argues that suspension agreement proceedings are free from statutory recordkeeping requirements other than the minimal notice and comment requirements required by 19 U.S.C. § 1671c(e), which details the procedures that Commerce is required to follow before suspending a countervailing duty investigation. *See id.* at 11–22; 19 U.S.C. § 1671c(e).

As a threshold matter, ASC contends that Plaintiff has failed to demonstrate that there is a "reasonable basis" in fact for the court to conclude that the administrative record is incomplete. *See* ASC Resp. at 8–10. Plaintiff asks that the court take notice of the *Financial Times* article describing the unrecorded ex parte communications between Commerce and interested parties as the "reasonable basis" justifying its motion to complete the record. *See* Pl.'s Mot. at 7 n.3 (citing *Nippon Steel Corp. v. United States*, 24 CIT 1158, 118 F. Supp. 2d 1366 (2000) (taking judicial notice of press reports indicating that there were ex parte meetings absent from the record)). ASC argues that *Nippon Steel* is distinguishable because "there was no serious dispute the record was incomplete" in that case. ASC Resp. at 9–10 n.6. Given the fact that the Government does not contest that the ex parte communications at issue actually took place,[3] the court disagrees with ASC. Accordingly, the court takes notice of the *Financial Times* article and finds that there exists a sufficiently reasonable basis to believe the record is incomplete.

Turning to the legal issues presented by CSC Sugar's motion, because Plaintiff's challenge and the Government's defense both hinge on the interpretation of the applicable statutory provisions, the court

[3] *See generally* Def.'s Resp. (making no arguments as to the "reasonable basis" for Plaintiff's motion and arguing only that the applicable statutes do not require Commerce to place on the record any ex parte meetings and communications in connection with suspension agreement negotiations).

applies the two-step framework of *Chevron*. Under step one of *Chevron*, the court considers whether Congressional intent on the issue is clear. *See Chevron*, 467 U.S. at 842–43 ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). If the court cannot identify a clear expression of Congressional intent and concludes that the statutory provision is silent or ambiguous as to the contested issue, the court turns to the second prong of *Chevron* and determines whether Commerce's interpretation of the statute is reasonable. *See id.* Because §§ 1516a(b)(2), 1677f(a)(3), and 1671c(e) convey clear Congressional intent to require Commerce to maintain a complete record of suspension agreement proceedings and related determinations, step one resolves the issue.

"In order to determine whether a statute clearly shows the intent of Congress in a Chevron step one analysis, [the court] employ[s] traditional tools of statutory construction and examine[s] 'the statute's text, structure, and legislative history, and appl[ies] the relevant canons of interpretation.'" *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012) (quoting *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000)). Three statutory sections are implicated: 19 U.S.C. § 1516a(b)(2)(A)(i), 19 U.S.C. § 1677f(a)(3), and 19 U.S.C. § 1671c(e). Section 1516a(b)(2)(A)(i), which defines the record for review in countervailing duty proceedings, provides:

> (A) In general
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> For the purposes of this subsection, the record, unless otherwise stipulated by the parties, shall consist of—
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> (i) a copy of *all information presented to or obtained by* the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, *including* all governmental memoranda pertaining to the case and *the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title*;

19 U.S.C. § 1516a(b)(2)(A)(i) (emphasis added). The language of this section is clear and unambiguous. It requires that "all information presented to or obtained by" Commerce in the course of reaching its determinations be provided to the court for review of challenges to those determinations. *See Kao Hsing Chang Iron & Steel Corp. v. United States*, 25 CIT 372, 140 F. Supp. 2d 1379 (2001) (discussing the breadth and scope of recordkeeping obligations imposed on Commerce under § 1516a(b)(2)(A) in conjunction with § 1677f(a)(3)).

The Government argues that suspension agreement negotiations are exempt from the requirements of § 1516a(b)(2) because those negotiations are "confidential" in nature. The Government, unfortunately, fails to cite or discuss 19 U.S.C. § 1516a(b)(2)(B), which specifically addresses the inclusion of confidential and privileged materials as within the scope of § 1516a(b)(2). *See* 19 U.S.C. § 1516a(b)(2)(B) (providing that recordkeeping requirements of § 1516a(b)(2) do not disturb confidential or privileged status of materials, but also noting that court may review such material in camera and may exercise discretion to direct disclosure). Other than the clarification that materials required to be in the record under § 1516a(b)(2) shall not lose their privileged or confidential status by virtue of their inclusion in the record, § 1516a(b)(2) provides no limitations on its requirement that the record include "all information presented to or obtained by" Commerce in the course of the proceeding. *See* 19 U.S.C. § 1516a(b)(2). This section does, however, expressly reference another statutory provision, 19 U.S.C. § 1677f(a)(3), which requires the memorialization of ex parte meetings.

Section 1677f(a)(3) provides:

> The administering authority ... shall maintain a record of any ex parte meeting between—
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> (A) interested parties or other persons providing factual information in connection with a proceeding, and
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> (B) the person charged with making the determination, or any person charged with making a final recommendation to that person, in connection with that proceeding,
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> if information relating to that proceeding was presented or discussed at such meeting. The record of such an ex parte meeting shall include the identity of the persons present at the meeting, the date, time, and place of the meeting, and a summary of the matters discussed or submitted. The record of the ex parte meeting shall be included in the record of the proceeding.

19 U.S.C. § 1677f(a)(3); *see also Nippon Steel Corp.*, 24 CIT at ___, 118 F. Supp. 2d at 1373 ("Any memoranda detailing *ex parte* communications must be a part of the record for judicial review."). The language of § 1677f(a)(3) is likewise clear and unambiguous: "*any* ex parte meeting" that addresses factual information in connection with a countervailing duty proceeding must be memorialized for the record by Commerce. 19 U.S.C. § 1677f(a)(3). The legislative history of § 1677f(a)(3) confirms the plain reading of the statutory language. The Senate Report states that the purpose of the section was to ensure the

"maximum availability of information to interested parties" so that "all parties to the proceeding are more fully aware of the presentation of information" to Commerce. *See* S. Rep. 96–249, Trade Agreements Act of 1979, at 100 (July 17, 1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 486. The legislative history further clarifies that Congress intended § 1677f(a)(3) to cover meetings that involved the transmittal of confidential information, and drafted the section to allow the preservation of confidentiality while also providing a process for interested parties to at least obtain "nonconfidential summaries" of that information. *Id.* The legislative history additionally confirms that § 1677f(a)(3) was enacted to guarantee broad access to information presented to the agency specifically because the "standard of judicial review of most administrative actions in countervailing duty ... proceedings is one of review on the administrative record." *Id.*

Although neither § 1516a(b)(2) nor § 1677f(a)(3) contain any exceptions or differing criteria for various types of proceedings, the Government argues that these sections must be read in pari materia with 19 U.S.C. § 1671c(e) to limit the proceedings to which they apply. Section 1671c(e) governs the procedure for Commerce to suspend a countervailing duty investigation and provides:

> Before an investigation may be suspended under subsection (b) or (c) the administering authority shall—
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> (1) notify the petitioner of, and consult with the petitioner concerning, its intention to suspend the investigation, and notify other parties to the investigation and the Commission not less than 30 days before the date on which it suspends the investigation,
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> (2) provide a copy of the proposed agreement to the petitioner at the time of the notification, together with an explanation of how the agreement will be carried out and enforced, and of how the agreement will meet the requirements of subsections (b) and (d) or (c) and (d), and
>
> (3) permit all interested parties described in section 1677(9) of this title to submit comments and information for the record before the date on which notice of suspension of the investigation is published under subsection (f)(1)(A).

19 U.S.C. § 1671c(e). There are no references to §§ 1516a(b)(2) or 1677f(a)(3) in the text of § 1671c(e); instead, § 1671c(e) simply provides that Commerce must provide notice and comment opportunities for all interested parties before issuing a notice of suspension. *Id.* The Government nevertheless insists that the intent of § 1671c(e) was to

provide the sole "notice, comment, and consultation procedures" that Commerce must follow in suspending a countervailing duty investigation (or, in this case, amending an existing suspension agreement). *See* Def.'s Resp. at 18. Specifically, the Government contends that Congress would not have included these notice and comment procedures in a separate section applicable to suspension agreements if it did not also intend these procedures to be mutually exclusive with the recordkeeping requirements of §§ 1516a(b)(2) and 1677f(a)(3). *Id.*

As support, the Government relies on a short quotation from the Senate Report that emphasizes the importance of Commerce's consultations with the petitioner prior to adopting a suspension agreement. *See id.* at 15 ("the requirement that the petitioner be consulted will not be met by pro forma communications. Complete disclosure and discussion is required." (*quoting* S. Rep. 96–249, at 54, 71, 1979 U.S.C.C.A.N. at 440, 457)). The Government's reliance on this language is perplexing because, to the extent that it is relevant at all, it suggests that Congress had no intention for suspension agreement negotiations to bypass any statutory recordkeeping requirements. The Government argues that "Congress['] emphas[is on] communications with the petitioner in the congressional reports accompanying the legislation makes sense only if Commerce's suspension agreement negotiations are otherwise off-the-record." *Id.* However, the Government's reading of this language strains credulity, as it ignores conflicting language in the Senate Report as well as the broader context of the statutory provisions regarding suspension agreements.

Prior to the passage of the Trade Agreements Act of 1979, the international trade law statutes did not permit suspension of investigations. *See* S. Rep. 96–249, at 51, 71, 1979 U.S.C.C.A.N. at 437, 457. In enacting § 1671c, Congress emphasized that suspension agreements were intended only for "unusual" and "narrowly circumscribed" circumstances. *Id.* at 71. Given this broader context, the Senate Report's emphasis on the importance of Commerce guaranteeing "complete disclosure and discussion" with petitioners in the suspension agreement process can best be understood as providing additional protections to the domestic industry. *Id.* Rather than justifying off-the-record communications as the basis for structuring suspension agreements, the legislative history of § 1671c suggests that Congress aimed to ensure that Commerce would not abuse its newly granted power to suspend investigations or restrict interested parties' access to relevant information in connection with a proposed suspension agreement. The Government has not identified, nor has the court found, anything in the legislative history of § 1671c that

suggests that suspension agreement negotiations were intended to be exempt from the generally applicable recordkeeping requirements of §§ 1516a(b)(2) and 1677f(a)(3).

The Government also relies on the history of Commerce's regulations, 19 C.F.R. §§ 351.208–.209, implementing § 1671c. *See* Def.'s Resp. at 23. Problematically, the Government's argument that "Commerce has long interpreted section 1671c(e) to mean that the negotiation of a suspension agreement is not subject to the record requirements of section 1516a(b)(2)," finds no support in the cited regulatory history. *See id.* (citing *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,312 (Dep't of Commerce May 19, 1997) (preamble to rulemaking adopting 19 C.F.R. §§ 351.208–.209)). That history fails to refer to § 1516a(b)(2) or otherwise corroborate the Government's position. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,312 (Dep't of Commerce May 19, 1997). Accordingly, the court does not agree that the language and legislative history of § 1671c(e), or its implementing regulations, support the Government's position.

The Government also misreads the statute when it argues that § 1671c(e)'s due process protections of notice and comment prior to a determination to suspend a countervailing duty investigation somehow conflict or render "superfluous" the recordkeeping requirements established in §§ 1516a(b)(2) and 1677f(a)(3). *See* Def.'s Resp. at 18. Section 1516a(b)(2), as described previously, defines the scope of the administrative record for the judicial review of countervailing duty proceedings. 19 U.S.C. § 1516a(b)(2). Included within the scope of the administrative record is a reference to § 1677f(a)(3), which requires that Commerce must maintain records of ex parte communications relating to countervailing duty proceedings. 19 U.S.C. § 1677f(a)(3). Taken together, §§ 1516(a)(b)(2) and 1677f(a)(3) provide the generally applicable recordkeeping requirements for Commerce's countervailing duty proceedings.

Section 1671c, on the other hand, does not address general recordkeeping requirements, but rather focuses on Commerce's ability to suspend or terminate countervailing duty investigations. 19 U.S.C. § 1671c. Section 1671c(e) specifically provides that Commerce must afford notice and comment to petitioners and other interested parties before suspending an investigation. 19 U.S.C. § 1671c(e). These notice and comment requirements do not serve to replace the recordkeeping requirements generally established in § 1516a(b)(2); instead, § 1671c(e) affords interested parties additional due process protections before Commerce may suspend a countervailing duty investigation.

See S. Rep. 96–249, at 51, 1979 U.S.C.C.A.N. at 437. Accordingly, the court rejects the Government's attempt to frame § 1671c(e) as somehow incompatible with or mutually exclusive of the recordkeeping requirements applicable to all countervailing duty proceedings in §§ 1516a(b)(2) and 1677f(a)(3).

Additionally, the court rejects the Government's argument that suspension agreement proceedings under § 1671c are not governed by the record requirements of §§ 1516a(b)(2) and 1677f(a)(3) for two other reasons. First, 19 U.S.C. § 1516a(a)(2)(B) lists the reviewable determinations that may be contested before the U.S. Court of International Trade. Specifically, § 1516a(a)(2)(B)(iv) provides that an interested party may challenge a determination by Commerce "under section 1671c or 1673c of this title, to suspend an antidumping duty or a countervailing duty investigation, including any final determination resulting from a continued investigation which changes the size of the dumping margin or net countervailable subsidy calculated, or the reasoning underlying such calculations, at the time the suspension agreement was concluded." 19 U.S.C. § 1516a(a)(2)(B)(iv). The plain language of § 1516a provides that Commerce's determinations involving suspension agreements are reviewable determinations, and the Government fails to point out any statutory language indicating Congressional intent to provide for different recordkeeping requirements for suspension agreement determinations as compared with any other reviewable determination listed under § 1516a(a).

Second, despite the Government's primary argument that suspension agreement proceedings are not governed by § 1677f(a)(3)'s recordkeeping requirements, the Government's actual recordkeeping conflicts with its claimed statutory interpretation. Commerce memorialized two ex parte meetings in this matter prior to the issuance of the final determination adopting the amendment to the CVD Suspension Agreement: one regarding a meeting between representatives of Mexico and Secretary of Commerce Ross in March 2017, and another regarding a discussion between Commerce officials and representatives of the domestic sugar industry in the "Sugar Users Association" in June 2017. *See Sugar From Mexico: Meeting with Secretary Wilbur Ross*, PD 58 (Dep't of Commerce Apr. 4, 2017); *Sugar from Mexico: Ex-parte Memo*, PD 76 (Dep't of Commerce June 21, 2017). The Government insists that no "substantive discussion" of the suspension agreement amendments occurred at these two ex parte meetings. Therefore, the Government maintains that memorializing these meetings was not inconsistent with its position that suspension agreement proceedings fall outside the scope of the recordkeeping

requirements of §§ 1516a(b)(2) or 1677f(a)(3). *See* Def.'s Resp. at 26–27. The Government emphasizes that these two ex parte meeting memoranda do not "memorialize[] deliberative discussion in any manner that would undermine an ongoing negotiation," and are thus distinct from the additional records sought by CSC Sugar. *Id.* at 27. The Government's argument, however, ignores the plain language requirement of § 1677f(a)(3), which applies to all ex parte communications involving the provision of "factual information in connection with a proceeding" and requires the memorialization of no more and no less than "the identity of the persons present at the meeting, the date, time, and place of the meeting, and a summary of the matters discussed or submitted." 19 U.S.C. § 1677f(a)(3). The statute does not differentiate between substantive and non-substantive ex parte meetings.

Aside from their statutory interpretation arguments, the Government and Defendant-Intervenors advance similar contentions that suspension agreement negotiations are in some way inherently privileged or confidential and are thus exempt from statutorily mandated recordkeeping and disclosure. *See* Def.'s Resp. at 19–20, 22– 26; ASC Resp. at 6–8 ("Any Communications Between Commerce and the Parties During the Negotiations to Amend the Suspension Agreements are Privileged"); Cámara Resp. at 6–8 (similarly suggesting that suspension agreement negotiations are akin to confidential settlement agreement discussions, or alternatively, that these negotiations are protected by the deliberative process privilege). Because Commerce failed to place on the record memoranda for the ex parte communications at issue that included at least the non-confidential information required by § 1677f(a) (i.e., a summary memorandum listing the date, time, and participants to the communication, as well as a non-confidential summary of general matters discussed), the court cannot reach the question of whether any specific content is protected from disclosure as confidential or privileged. *See* 19 U.S.C. § 1677f(a)(3). Both the statute, as well as Commerce's regulation defining the official record for review for determinations challenged before this Court, are clear: the record includes "all information presented to or obtained by" the agency, including confidential and privileged material. *See* 19 U.S.C. § 1516a(b)(2); 19 C.F.R. § 351.104(a) ("The official record will include government memoranda pertaining to the proceeding, memoranda of ex parte meetings, determinations, notices published in the Federal Register, and transcripts of hearings. The official record will contain material that is public, business proprietary, privileged, and classified.").

Accordingly, once the Government has filed the requisite non-confidential information required by §§ 1516a(b)(2) and 1677f(a)(3), as part of the administrative record in this action, it may seek protection for any substantive confidential and privileged information that may otherwise be required for disclosure by those statutory provisions. *See* 19 U.S.C. § 1516a(b)(2)(B) (stating that privileged or confidential information may retain the appropriate protections from disclosure, and that the court "may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order."); Pl.'s Reply at 11 ("to the extent that confidentiality, as opposed to privilege, is the issue, information may be released under an administrative protective order to counsel to protect confidentiality"); *see also USX Corp. v. United States*, 11 CIT 419, 664 F. Supp. 519 (1987) (analyzing government's claim of deliberative process privilege after government conceded that documents should be on the record but protected from public disclosure under § 1516a(b)(2)); *Star-Kist Foods, Inc. v. United States*, 8 CIT 305, 600 F. Supp. 212 (1984) (discussing the court's authority to order disclosure of confidential documents under § 1516a(b)(2) and analyzing the assertion of privilege after the Government had added public and confidential versions of the contested documents to the record). In asserting privilege claims the Government carries the burden of proof and must provide a specific basis for claiming privilege applies. *See United States v. Greenlight Organic, Inc.*, 41 CIT ___, ___, 279 F. Supp. 3d 1317, 1320 (2017) ("In order to invoke executive privilege, the party claiming it must (1) make a formal claim of privilege via the head of the agency or his delegate, (2) submit an affidavit showing 'actual personal consideration by that official,' and (3) provide a detailed explanation of what the document is and why it falls within the scope of the privilege." (citing *Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000)).[4]

As a final note, the court observes that in addition to requesting an order requiring Commerce to memorialize and include in the record memoranda regarding ex parte communications in Commerce's negotiation of the CVD Amendment during April and May 2017, CSC Sugar also requests that the court direct Commerce to add to the

[4] The court notes that although Defendant-Intervenors suggest that some form of privilege may protect the information at issue in Plaintiff's motion, the Government has failed to identify or assert any particular claim of privilege in its briefing. *See generally* Def.'s Resp. Without further comment, the court also observes that in *Baker & Hostetler LLP v. Dep't of Commerce*, 473 F.3d 312 (D.C. Cir 2006), a case cited favorably by the Government in its response brief, the Commerce Department took the express position that the record requirement of § 1677f(a)(3) is a "public record" that would not be limited by § 1516a(b)(2)(B)'s preservation of otherwise confidential or privileged materials. *See Baker & Hostetler LLP*, 473 F.3d at 322 (quoting the Commerce Department's brief).

record ex parte memoranda published *after* Commerce's final determination adopting the CVD Amendment. *See* Pl.'s Br. at 8. The court rejects Plaintiff's suggestion that the record should include any ex parte memoranda created after the challenged final determination that was published on July 11, 2017. *See Torrington Co. v. United States*, 16 CIT 76, 77–78, 786 F. Supp. 1027, 1029 (1992) ("Any information received by Commerce after the particular determination at issue is not part of the reviewable administrative record." (citing *Ipsco, Inc. v. United States*, 13 CIT 489, 494, 715 F. Supp. 1104, 1109 (1989))).

IV. Conclusion

Accordingly, it is hereby

ORDERED that CSC Sugar's motion to complete the administrative record is granted in part and denied in part; it is further

ORDERED that Commerce shall supplement the administrative record on or before July 11, 2018 by filing with the court the record of any ex parte meetings about the CVD Amendment; and it is further

ORDERED that the parties shall file a proposed scheduling order governing further proceedings in this action on or before July 18, 2018.

Dated: June 1, 2018
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 18–65

CSC SUGAR LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 17–00215

[Plaintiff's motion to complete the administrative record is granted in part and denied in part.]

Dated: June 1, 2018

Jeffrey S. Neeley and *Michael Klebanov*, Husch Blackwell, LLP, of Washington, DC for Plaintiff CSC Sugar LLC.

Alexander O. Canizares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC for Defendant United States. With him on the brief was *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Lydia Caprice Pardini*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Robert Charles Cassidy, Jr., Charles S. Levy, James R. Cannon, Jr., Jonathan M. Zielinsky, and *Nina R. Tandon*, Cassidy Levy Kent (USA) LLP, of Washington, DC for Defendant-Intervenors the American Sugar Coalition, American Sugar Cane League, American Sugarbeet Growers Association, American Sugar Refining, Inc., Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and the United States Beet Sugar Association.

Rosa S. Jeong and *Irwin P. Altschuler*, Greenberg Traurig, LLP, of Washington, DC for Defendant-Intervenor Cámara Nacional de Las Industrias Azucarera y Alcoholera.

Gregory J. Spak, Kristina Zissis, and *Ron Kendler*, White & Case LLP, of Washington, DC for Defendant-Intervenor Imperial Sugar Company.

OPINION AND ORDER

Gordon, Judge:

Before the court is the motion of Plaintiff CSC Sugar LLC ("Plaintiff" or "CSC Sugar") to complete the administrative record filed by the U.S. Department of Commerce ("Commerce") in this action challenging Commerce's determination to amend the suspension agreement regarding the antidumping duty investigation on *Sugar From Mexico. See Sugar from Mexico*, 82 Fed. Reg. 31,945, PD 114[1] (Dep't of Commerce July 11, 2017) (amendment to the AD Suspension Agreement) ("AD Amendment"); Pl.'s Mot. to Complete Admin. R., ECF Nos. 32 & 33 ("Pl.'s Mot."); *see also* Def.'s Resp. to Pl.'s Mot. to Complete Admin. R., ECF No. 46 ("Def.'s Resp."); Def.-Intervenor Cámara Nacional de Las Industrias Azucarera y Alcoholera Resp. Opp. Pl.'s Mot. to Complete Admin R., ECF No. 44 ("Cámara Resp."); Def.-Intervenors American Sugar Coalition, American Sugar Cane League, American Sugarbeet Growers Association, American Sugar

[1] "PD ___" refers to a document contained in the public administrative record, which is found in ECF No. 29–1, unless otherwise noted. "CD ___" refers to a document contained in the confidential administrative record, which is found in ECF No. 29–2, unless otherwise noted.

Refining, Inc., Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and the United States Beet Sugar Association's Resp. Opp. Pl.'s Mot. to Complete Admin R., ECF No. 45 ("ASC Resp."); Pl.'s Reply in Supp. of Mot. to Complete Admin. R., ECF No. 50 ("Pl.'s Reply"). The court has jurisdiction over this matter pursuant to Section 516A(a)(2)(B)(iv) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iv), and 28 U.S.C. § 1581(c) (2012).[2] For the reasons set forth below, the court grants Plaintiff's Motion to Complete the Administrative Record in part and denies it in part.

I. Background

In 2014, after the American Sugar Coalition, and its members (collectively, "ASC"), filed a petition with Commerce and the U.S. International Trade Commission ("ITC"), the agencies conducted an investigation as to whether imports of sugar from Mexico were being sold at less than fair value, and whether such imports were injurious to the U.S. industry. Commerce preliminarily determined that sugar from Mexico was being sold, or likely to be sold, into the United States at less than fair value. *See Sugar From Mexico: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 Fed. Reg. 65,189 (Dep't of Commerce Nov. 3, 2014). Commerce and the Government of Mexico subsequently signed a suspension agreement. *See Sugar From Mexico: Suspension of Antidumping Investigation*, 79 Fed. Reg. 78,039 (Dep't of Commerce Dec. 29, 2014) ("AD Suspension Agreement").

In January 2015, Imperial Sugar Company and AmCane Sugar LLC, requested a review by the ITC of the AD Suspension Agreement to determine whether that agreement had completely eliminated the injurious effects of imports of sugar from Mexico. *See Sugar from Mexico: Continuation of Antidumping and Countervailing Duty Investigations*, 80 Fed. Reg. 25,278, 25,280 (Dep't of Commerce May 4, 2015). Thereafter, the ITC concluded that the AD Suspension Agreement had indeed eliminated completely the injurious effects of imports of sugar from Mexico. *Id.*

In early 2016, Imperial Sugar, AmCane, and ASC requested that Commerce initiate an administrative review of the AD Suspension Agreement covering the period from December 19, 2014 to December 31, 2014. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 6,832, 6,839 & n.9 (Dep't of Commerce Feb. 9, 2016). During the pendency of the administrative

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

review, the United States began direct negotiations with both the Government of Mexico and producers and exporters of sugar from Mexico regarding possible amendment of the AD Suspension Agreement. On March 9, 2017, the U.S. Secretary of Commerce met with his Mexican counterpart to announce "a new round of negotiations regarding the serious issues identified with the functioning of the current [suspension] agreements on sugar from Mexico." *Sugar from Mexico: Meeting with Secretary Wilbur Ross*, PD 77 (Dep't of Commerce Apr. 4, 2017). Commerce then notified representatives of Mexican producers and exporters of sugar and the Government of Mexico that Commerce intended to terminate the AD Suspension Agreement on June 5, 2017, unless a revised agreement was reached by that date, citing "outstanding issues between the parties." *See* Letter from Commerce to Juan Cortina Gallardo and Additional Signatories re: termination of AD Suspension Agreement, PD 78 (May 1, 2017).

By mid-June 2017, Commerce and the Government of Mexico had reached agreement on these issues and initialed draft amendments to the AD Suspension Agreement. The draft amendments proposed, among other items, that the definition of "refined sugar" be changed to 99.2 degrees polarity, even though 99.5 degrees polarity had been the definition since the investigation began in 2014. *See* Pl.'s Mot. at 3–4.

In keeping with the notice and comment requirements of 19 U.S.C. § 1673c(e)(3), Commerce invited interested parties to comment on the draft amendments as well as draft memoranda explaining how the revisions to the AD Suspension Agreement met the relevant statutory requirements. *See* Def.'s Resp. at 6–7. After considering comments from interested parties, Commerce, on June 30, 2017, signed final amendments to the AD Suspension Agreement. AD Amendment, 82 Fed. Reg. at 31,945. In August 2017, Commerce released final memoranda explaining how the amended agreement met the relevant statutory requirements and addressing individual comments from the parties. *See* Def.'s Resp. at 7 (citing explanatory memoranda available at PD 119–122). Subsequently, CSC Sugar commenced this action, challenging Commerce's amendment to the AD Suspension Agreement. *See* Compl., ECF No. 11.[3] Commerce then filed the administrative record that was in turn followed by Plaintiff's motion to complete the record. *See* Admin. R. Index, ECF No. 29; *see also* Pl.'s Mot.

[3] CSC Sugar also filed a parallel action, Court No. 17–00214, challenging Commerce's amendment to the CVD Suspension Agreement, which is addressed in this Court's decision in Slip Op. 18–64, also issued this date.

II. Standard of Review

"Where an agency presents a certified copy of the complete administrative record, as was done in this case, 'the court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary.'" *Defenders of Wildlife v. Dalton*, 24 CIT 1116, 1119 (2000) (quoting *Ammex, Inc. v. United States*, 23 CIT 549, 555, 62 F. Supp. 2d 1148, 1156 (1999)). To prevail on "a motion to complete the administrative record, 'a party must do more than simply allege that the record is incomplete. Rather, a party must provide the Court with reasonable, non-speculative grounds to believe that materials considered in the decision-making process are not included in the record.'" *Id.* (quoting *Ammex*, 23 CIT at 556, 62 F. Supp. 2d at 1156–57).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping duty statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (An agency's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

III. Discussion

CSC Sugar contends that Commerce did not meet its obligation to file a complete administrative record with the court as required by 19 U.S.C. § 1516a(b)(2)(A)(i) and USCIT Rule 73.2(a). *See* Pl.'s Mot. at 10–11. Specifically, Plaintiff argues that Commerce failed to memorialize and include in the record ex parte communications between Commerce officials and interested parties (including the domestic sugar industry and representatives of Mexico) as required by 19 U.S.C. § 1677f(a)(3). *Id.* at 7–11. In support of its contention, Plaintiff relies on a *Financial Times* article dated May 31, 2017 that specifically reports on phone calls in May 2017 between the U.S. Secretary of Commerce, U.S. sugar industry representatives, and Mexican sugar industry representatives regarding negotiations to amend the AD Suspension Agreement. *See* Pl.'s Mot. at Ex. 2 ("*Financial Times* article").

The Government does not dispute that these ex parte calls occurred. *See generally* Def.'s Resp. Given this, Plaintiff maintains that under the plain language of §§ 1516a(b)(2) and 1677f(a)(3), Commerce failed to provide the court with the requisite complete "copy of all information presented to or obtained by [Commerce] ... including ... the record of ex parte meetings required to be kept by section 1677f(a)(3)." *See* 19 U.S.C. § 1516a(b)(2)(A)(i); *accord* USCIT R.

73.2(a)(1); *see also* 19 U.S.C. § 1677f(a)(3). In response, the Government contends that Plaintiff's argument is fundamentally flawed because Commerce was not required to maintain records of ex parte meetings that occurred during the course of suspension agreement negotiations. *See generally* Def.'s Resp. at 11–26. Specifically, the Government maintains that § 1516(b)(2) and § 1677f(a)(3)'s requirements do not apply to negotiations of a suspension agreement or amendments. The Government further argues that suspension agreement proceedings are free from statutory recordkeeping requirements other than the minimal notice and comment requirements required by 19 U.S.C. § 1673c(e), which details the procedures that Commerce is required to follow before suspending an antidumping duty investigation. *See id.* at 11–22; 19 U.S.C. § 1673c(e).

As a threshold matter, ASC contends that Plaintiff has failed to demonstrate that there is a "reasonable basis" in fact for the court to conclude that the administrative record is incomplete. *See* ASC Resp. at 8–10. Plaintiff asks that the court take notice of the *Financial Times* article describing the unrecorded ex parte communications between Commerce and interested parties as the "reasonable basis" justifying its motion to complete the record. *See* Pl.'s Mot. at 7 n.3 (citing *Nippon Steel Corp. v. United States*, 24 CIT 1158, 118 F. Supp. 2d 1366 (2000) (taking judicial notice of press reports indicating that there were ex parte meetings absent from the record)). ASC argues that *Nippon Steel* is distinguishable because "there was no serious dispute the record was incomplete" in that case. ASC Resp. at 9–10 n.6. Given the fact that the Government does not contest that the ex parte communications at issue actually took place,[4] the court disagrees with ASC. Accordingly, the court takes notice of the *Financial Times* article and finds that there exists a sufficiently reasonable basis to believe the record is incomplete.

Turning to the legal issues presented by CSC Sugar's motion, because Plaintiff's challenge and the Government's defense both hinge on the interpretation of the applicable statutory provisions, the court applies the two-step framework of *Chevron*. Under step one of *Chevron*, the court considers whether Congressional intent on the issue is clear. *See Chevron*, 467 U.S. at 842–43 ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). If the court cannot identify a

[4] *See generally* Def.'s Resp. (making no arguments as to the "reasonable basis" for Plaintiff's motion and arguing only that the applicable statutes do not require Commerce to place on the record any ex parte meetings and communications in connection with suspension agreement negotiations).

clear expression of Congressional intent and concludes that the statutory provision is silent or ambiguous as to the contested issue, the court turns to the second prong of *Chevron* and determines whether Commerce's interpretation of the statute is reasonable. *See id.* Because §§ 1516a(b)(2), 1677f(a)(3), and 1673c(e) convey clear Congressional intent to require Commerce to maintain a complete record of suspension agreement proceedings and related determinations, step one resolves the issue.

"In order to determine whether a statute clearly shows the intent of Congress in a Chevron step one analysis, [the court] employ[s] traditional tools of statutory construction and examine[s] 'the statute's text, structure, and legislative history, and appl[ies] the relevant canons of interpretation.'" *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012) (quoting *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000)). Three statutory sections are implicated: 19 U.S.C. § 1516a(b)(2)(A)(i), 19 U.S.C. § 1677f(a)(3), and 19 U.S.C. § 1673c(e). Section 1516a(b)(2)(A)(i), which defines the record for review in antidumping duty proceedings, provides:

> (A) In general
>
> For the purposes of this subsection, the record, unless otherwise stipulated by the parties, shall consist of—
>
> (i) a copy of *all information presented to or obtained by* the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, *including* all governmental memoranda pertaining to the case and *the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title*;

19 U.S.C. § 1516a(b)(2)(A)(i) (emphasis added). The language of this section is clear and unambiguous. It requires that "all information presented to or obtained by" Commerce in the course of reaching its determinations be provided to the court for review of challenges to those determinations. *See Kao Hsing Chang Iron & Steel Corp. v. United States*, 25 CIT 372, 140 F. Supp. 2d 1379 (2001) (discussing the breadth and scope of recordkeeping obligations imposed on Commerce under § 1516a(b)(2)(A) in conjunction with § 1677f(a)(3)).

The Government argues that suspension agreement negotiations are exempt from the requirements of § 1516a(b)(2) because those negotiations are "confidential" in nature. The Government, unfortunately, fails to cite or discuss 19 U.S.C. § 1516a(b)(2)(B), which specifically addresses the inclusion of confidential and privileged materials as within the scope of § 1516a(b)(2). *See* 19 U.S.C. § 1516a(b)(2)(B) (providing that recordkeeping requirements of §

1516a(b)(2) do not disturb confidential or privileged status of materials, but also noting that court may review such material in camera and may exercise discretion to direct disclosure). Other than the clarification that materials required to be in the record under § 1516a(b)(2) shall not lose their privileged or confidential status by virtue of their inclusion in the record, § 1516a(b)(2) provides no limitations on its requirement that the record include "all information presented to or obtained by" Commerce in the course of an antidumping duty proceeding. *See* 19 U.S.C. § 1516a(b)(2). This section does, however, expressly reference another statutory provision, 19 U.S.C. § 1677f(a)(3), which requires the memorialization of ex parte meetings.

Section 1677f(a)(3) provides:

> The administering authority ... shall maintain a record of any ex parte meeting between—
>
> (A) interested parties or other persons providing factual information in connection with a proceeding, and
>
> (B) the person charged with making the determination, or any person charged with making a final recommendation to that person, in connection with that proceeding,
>
> if information relating to that proceeding was presented or discussed at such meeting. The record of such an ex parte meeting shall include the identity of the persons present at the meeting, the date, time, and place of the meeting, and a summary of the matters discussed or submitted. The record of the ex parte meeting shall be included in the record of the proceeding.

19 U.S.C. § 1677f(a)(3); *see also Nippon Steel Corp.*, 24 CIT at ___, 118 F. Supp. 2d at 1373 ("Any memoranda detailing *ex parte* communications must be a part of the record for judicial review."). The language of § 1677f(a)(3) is likewise clear and unambiguous: "*any* ex parte meeting" that addresses factual information in connection with an antidumping duty proceeding must be memorialized for the record by Commerce. 19 U.S.C. § 1677f(a)(3). The legislative history of § 1677f(a)(3) confirms the plain reading of the statutory language. The Senate Report states that the purpose of the section was to ensure the "maximum availability of information to interested parties" so that "all parties to the proceeding are more fully aware of the presentation of information" to Commerce. *See* S. Rep. 96–249, Trade Agreements Act of 1979, at 100 (July 17, 1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 486. The legislative history further clarifies that Congress intended § 1677f(a)(3) to cover meetings that involved the transmittal

of confidential information, and drafted the section to allow the preservation of confidentiality while also providing a process for interested parties to at least obtain "nonconfidential summaries" of that information. *Id.* The legislative history additionally confirms that § 1677f(a)(3) was enacted to guarantee broad access to information presented to the agency specifically because the "standard of judicial review of most administrative actions in ... antidumping duty proceedings is one of review on the administrative record." *Id.*

Although neither § 1516a(b)(2) nor § 1677f(a)(3) contain any exceptions or differing criteria for various types of proceedings, the Government argues that these sections must be read in pari materia with 19 U.S.C. § 1673c(e) to limit the proceedings to which they apply. Section 1673c(e) governs the procedure for Commerce to suspend an antidumping duty investigation and provides:

> Before an investigation may be suspended under subsection (b) or (c) the administering authority shall—
>
> (1) notify the petitioner of, and consult with the petitioner concerning, its intention to suspend the investigation, and notify other parties to the investigation and the Commission not less than 30 days before the date on which it suspends the investigation,
>
> (2) provide a copy of the proposed agreement to the petitioner at the time of the notification, together with an explanation of how the agreement will be carried out and enforced, and of how the agreement will meet the requirements of subsections (b) and (d) or (c) and (d), and
>
> (3) permit all interested parties described in section 1677(9) of this title to submit comments and information for the record before the date on which notice of suspension of the investigation is published under subsection (f)(1)(A).

19 U.S.C. § 1673c(e). There are no references to §§ 1516a(b)(2) or 1677f(a)(3) in the text of § 1673c(e); instead, § 1673c(e) simply provides that Commerce must provide notice and comment opportunities for all interested parties before issuing a notice of suspension. *Id.* The Government nevertheless insists that the intent of § 1673c(e) was to provide the sole "notice, comment, and consultation procedures" that Commerce must follow in suspending an antidumping duty investigation (or, in this case, amending an existing suspension agreement). *See* Def.'s Resp. at 18. Specifically, the Government contends that Congress would not have included these notice and comment proce-

dures in a separate section applicable to suspension agreements if it did not also intend these procedures to be mutually exclusive with the recordkeeping requirements of §§ 1516a(b)(2) and 1677f(a)(3). *Id.*

As support, the Government relies on a short quotation from the Senate Report that emphasizes the importance of Commerce's consultations with the petitioner prior to adopting a suspension agreement. *See id.* at 15 ("the requirement that the petitioner be consulted will not be met by pro forma communications. Complete disclosure and discussion is required." (*quoting* S. Rep. 96–249, at 54, 71, 1979 U.S.C.C.A.N. at 440, 457)). The Government's reliance on this language is perplexing because, to the extent that it is relevant at all, it suggests that Congress had no intention for suspension agreement negotiations to bypass any statutory recordkeeping requirements. The Government argues that "Congress['] emphas[is on] communications with the petitioner in the congressional reports accompanying the legislation makes sense only if Commerce's suspension agreement negotiations are otherwise off-the-record." *Id.* However, the Government's reading of this language strains credulity, as it ignores conflicting language in the Senate Report as well as the broader context of the statutory provisions regarding suspension agreements.

Prior to the passage of the Trade Agreements Act of 1979, the international trade law statutes did not permit suspension of investigations. *See* S. Rep. 96–249, at 51, 71, 1979 U.S.C.C.A.N. at 437, 457. In enacting § 1673c, Congress emphasized that suspension agreements were intended only for "unusual" and "narrowly circumscribed" circumstances. *Id.* at 71. Given this broader context, the Senate Report's emphasis on the importance of Commerce guaranteeing "complete disclosure and discussion" with petitioners in the suspension agreement process can best be understood as providing additional protections to the domestic industry. *Id.* Rather than justifying off-the-record communications as the basis for structuring suspension agreements, the legislative history of § 1673c suggests that Congress aimed to ensure that Commerce would not abuse its newly granted power to suspend investigations or restrict interested parties' access to relevant information in connection with a proposed suspension agreement. The Government has not identified, nor has the court found, anything in the legislative history of § 1673c that suggests that suspension agreement negotiations were intended to be exempt from the generally applicable recordkeeping requirements of §§ 1516a(b)(2) and 1677f(a)(3).

The Government also relies on the history of Commerce's regulations, 19 C.F.R. §§ 351.208–.209, implementing § 1673c. *See* Def.'s Resp. at 23. Problematically, the Government's argument that "Com-

merce has long interpreted section 1673c(e) to mean that the negotiation of a suspension agreement is not subject to the record requirements of section 1516a(b)(2)," finds no support in the cited regulatory history. *See id.* (citing *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,312 (Dep't of Commerce May 19, 1997) (preamble to rulemaking adopting 19 C.F.R. §§ 351.208–.209)). That history fails to refer to § 1516a(b)(2) or otherwise corroborate the Government's position. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,312 (Dep't of Commerce May 19, 1997). Accordingly, the court does not agree that the language and legislative history of § 1673c(e), or its implementing regulations, support the Government's position.

The Government also misreads the statute when it argues that § 1673c(e)'s due process protections of notice and comment prior to a determination to suspend an antidumping investigation somehow conflict or render "superfluous" the recordkeeping requirements established in §§ 1516a(b)(2) and 1677f(a)(3). *See* Def.'s Resp. at 18. Section 1516a(b)(2), as described previously, defines the scope of the administrative record for the judicial review of antidumping duty proceedings. 19 U.S.C. § 1516a(b)(2). Included within the scope of the administrative record is a reference to § 1677f(a)(3), which requires that Commerce must maintain records of ex parte communications relating to antidumping duty proceedings. 19 U.S.C. § 1677f(a)(3). Taken together, §§ 1516(a)(b)(2) and 1677f(a)(3) provide the generally applicable recordkeeping requirements for Commerce's antidumping duty proceedings.

Section 1673c, on the other hand, does not address general recordkeeping requirements, but rather focuses on Commerce's ability to suspend or terminate antidumping duty investigations. 19 U.S.C. § 1673c. Section 1673c(e) specifically provides that Commerce must afford notice and comment to petitioners and other interested parties before suspending an investigation. 19 U.S.C. § 1673c(e). These notice and comment requirements do not serve to replace the recordkeeping requirements generally established in § 1516a(b)(2). Instead, § 1673c(e) affords interested parties additional due process protections before Commerce may suspend an antidumping investigation. *See* S. Rep. 96–249, at 71, 1979 U.S.C.C.A.N. at 457. Accordingly, the court rejects the Government's attempt to frame § 1673c(e) as somehow incompatible with or mutually exclusive of the recordkeeping requirements applicable to all antidumping duty proceedings in §§ 1516a(b)(2) and 1677f(a)(3).

Additionally, the court rejects the Government's argument that suspension agreement proceedings under § 1673(c) are not governed

by the record requirements of §§ 1516a(b)(2) and 1677f(a)(3) for two other reasons. First, 19 U.S.C. § 1516a(a)(2)(B) lists the reviewable determinations that may be contested before the U.S. Court of International Trade. Specifically, § 1516a(a)(2)(B)(iv) provides that an interested party may challenge a determination by Commerce "under section 1671c or 1673c of this title, to suspend an antidumping duty or a countervailing duty investigation, including any final determination resulting from a continued investigation which changes the size of the dumping margin or net countervailable subsidy calculated, or the reasoning underlying such calculations, at the time the suspension agreement was concluded." 19 U.S.C. § 1516a(a)(2)(B)(iv). The plain language of § 1516a provides that Commerce's determinations involving suspension agreements are reviewable determinations, and the Government fails to point out any statutory language indicating Congressional intent to provide for different recordkeeping requirements for suspension agreement determinations as compared with any other reviewable determination listed under § 1516a(a).

Second, despite the Government's primary argument that suspension agreement proceedings are not governed by § 1677f(a)(3)'s recordkeeping requirements, the Government's actual recordkeeping conflicts with its claimed statutory interpretation. Commerce memorialized two ex parte meetings in this matter prior to the issuance of the final determination adopting the amendment to the AD Suspension Agreement: one regarding a meeting between representatives of Mexico and Secretary of Commerce Ross in March 2017, and another regarding a discussion between Commerce officials and representatives of the domestic sugar industry in the "Sugar Users Association" in June 2017. *See Sugar From Mexico: Meeting with Secretary Wilbur Ross*, PD 77 (Dep't of Commerce Apr. 4, 2017); *Sugar from Mexico: Ex-parte Memo*, PD 95 (Dep't of Commerce June 21, 2017). The Government insists that no "substantive discussion" of the suspension agreement amendments occurred at these two ex parte meetings. Therefore, the Government maintains that memorializing these meetings was not inconsistent with its position that suspension agreement proceedings fall outside the scope of the recordkeeping requirements of §§ 1516a(b)(2) or 1677f(a)(3). *See* Def.'s Resp. at 26–27. The Government emphasizes that these two ex parte meeting memoranda do not "memorialize[] deliberative discussion in any manner that would undermine an ongoing negotiation," and are thus distinct from the additional records sought by CSC Sugar. *Id.* at 27. The Government's argument, however, ignores the plain language requirement of § 1677f(a)(3), which applies to *all* ex parte communications involving the provision of "factual information in connection

with a proceeding" and requires the memorialization of no more and no less than "the identity of the persons present at the meeting, the date, time, and place of the meeting, and a summary of the matters discussed or submitted." 19 U.S.C. § 1677f(a)(3). The statute does not differentiate between substantive and non-substantive ex parte meetings.

Aside from their statutory interpretation arguments, the Government and Defendant-Intervenors advance similar contentions that suspension agreement negotiations are in some way inherently privileged or confidential and are thus exempt from statutorily mandated recordkeeping and disclosure. *See* Def.'s Resp. at 19–20, 22– 26; ASC Resp. at 6–8 ("Any Communications Between Commerce and the Parties During the Negotiations to Amend the Suspension Agreements are Privileged"); Cámara Resp. at 6–8 (similarly suggesting that suspension agreement negotiations are akin to confidential settlement agreement discussions, or alternatively, that these negotiations are protected by the deliberative process privilege). Because Commerce failed to place on the record memoranda for the ex parte communications at issue that included at least the non-confidential information required by § 1677f(a) (i.e., a summary memorandum listing the date, time, and participants to the communication, as well as a non-confidential summary of general matters discussed), the court cannot reach the question of whether any specific content is protected from disclosure as confidential or privileged. *See* 19 U.S.C. § 1677f(a)(3). Both the statute, as well as Commerce's regulation defining the official record for review for determinations challenged before this Court, are clear: the record includes "all information presented to or obtained by" the agency, including confidential and privileged material. *See* 19 U.S.C. § 1516a(b)(2); 19 C.F.R. § 351.104(a) ("The official record will include government memoranda pertaining to the proceeding, memoranda of ex parte meetings, determinations, notices published in the Federal Register, and transcripts of hearings. The official record will contain material that is public, business proprietary, privileged, and classified.").

Accordingly, once the Government has filed the requisite non-confidential information required by §§ 1516a(b)(2) and 1677f(a)(3), as part of the administrative record in this action, it may seek protection for any substantive confidential and privileged information that may otherwise be required for disclosure by those statutory provisions. *See* 19 U.S.C. § 1516a(b)(2)(B) (stating that privileged or confidential information may retain the appropriate protections from disclosure, and that the court "may examine, in camera, the confidential or privileged material, and may disclose such material

under such terms and conditions as it may order."); Pl.'s Reply at 11 ("to the extent that confidentiality, as opposed to privilege, is the issue, information may be released under an administrative protective order to counsel to protect confidentiality"); *see also USX Corp. v. United States*, 11 CIT 419, 664 F. Supp. 519 (1987) (analyzing government's claim of deliberative process privilege after government conceded that documents should be on the record but protected from public disclosure under § 1516a(b)(2)); *Star-Kist Foods, Inc. v. United States*, 8 CIT 305, 600 F. Supp. 212 (1984) (discussing the court's authority to order disclosure of confidential documents under § 1516a(b)(2) and analyzing the assertion of privilege after the Government had added public and confidential versions of the contested documents to the record). In asserting privilege claims the Government carries the burden of proof and must provide a specific basis for claiming privilege applies. *See United States v. Greenlight Organic, Inc.*, 41 CIT ___, ___, 279 F. Supp. 3d 1317, 1320 (2017) ("In order to invoke executive privilege, the party claiming it must (1) make a formal claim of privilege via the head of the agency or his delegate, (2) submit an affidavit showing 'actual personal consideration by that official,' and (3) provide a detailed explanation of what the document is and why it falls within the scope of the privilege." (citing *Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000)).[5]

As a final note, the court observes that in addition to requesting an order requiring Commerce to memorialize and include in the record memoranda regarding ex parte communications in Commerce's negotiation of the AD Amendment during April and May 2017, CSC Sugar also requests that the court direct Commerce to add to the record ex parte memoranda published *after* Commerce's final determination adopting the AD Amendment. *See* Pl.'s Br. at 8. The court rejects Plaintiff's suggestion that the record should include any ex parte memoranda created after the challenged final determination that was published on July 11, 2017. *See Torrington Co. v. United States*, 16 CIT 76, 77–78, 786 F. Supp. 1027, 1029 (1992) ("Any information received by Commerce after the particular determination

[5] The court notes that although Defendant-Intervenors suggest that some form of privilege may protect the information at issue in Plaintiff's motion, the Government has failed to identify or assert any particular claim of privilege. *See generally* Def.'s Resp. Without further comment, the court also observes that in *Baker & Hostetler LLP v. Dep't of Commerce*, 473 F.3d 312 (D.C. Cir 2006), a case cited favorably by the Government in its response brief, Commerce took the express position that the record requirement of § 1677f(a)(3) is a "public record" that would not be limited by § 1516a(b)(2)(B)'s preservation of otherwise confidential or privileged materials. *See Baker & Hostetler LLP*, 473 F.3d at 322 (quoting the Commerce Department's brief).

at issue is not part of the reviewable administrative record." (citing *Ipsco, Inc. v. United States*, 13 CIT 489, 494, 715 F. Supp. 1104, 1109 (1989))).

IV. Conclusion

Accordingly, it is hereby

ORDERED that CSC Sugar's motion to complete the administrative record is granted in part and denied in part; it is further

ORDERED that Commerce shall supplement the administrative record on or before July 11, 2018 by filing with the court the record of any ex parte meetings about the AD Amendment; and it is further

ORDERED that the parties shall file a proposed scheduling order governing further proceedings in this action on or before July 18, 2018.

Dated: June 1, 2018
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 18–66

TOSÇELIK PROFIL VE SAC ENDÜSTRISI A.Ş., Plaintiff, v. UNITED STATES, Defendant, and ZEKELMAN INDUSTRIES, Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 17–00018

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination in the 2014–2015 administrative review of the antidumping duty order on welded carbon steel standard pipe and tube products from Turkey.]

Dated: June 6, 2018

David L. Simon, Law Office of David L. Simon, of Washington, D.C., argued for Plaintiff Tosçelik Profil ve Sac Endüstrisi A.Ş.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant United States. With her on brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Catherine D. Miller*, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Christopher T. Cloutier, Schagrin Associates, of Washington, D.C., argued for Consolidated Plaintiff and Defendant-Intervenor Zekelman Industries. With him on brief were *Paul W. Jameson* and *Roger B. Schagrin*. Of counsel were *Elizabeth J. Drake* and *John W. Bohn*.

OPINION AND ORDER

Choe-Groves, Judge:

This case involves corrosion-resistant steel products from Turkey. Plaintiff Tosçelik Profil ve Sac Endüstrisi A.Ş. ("Plaintiff" or "Tosçelik") and Consolidated Plaintiff and Defendant-Intervenor Zekelman Industries ("Zekelman") bring this action contesting the final results of the administrative review of welded carbon steel standard pipe and tube products from Turkey, in which the U.S. Department of Commerce ("Commerce" or "Department") found that the products at issue are being, or are likely to be, sold in the United States at less-than-fair value. *See Welded Carbon Steel Standard Pipe and Tube Products From Turkey*, 81 Fed. Reg. 92,785 (Dep't Commerce Dec. 20, 2016) (final results of administrative review; 2014–2015), *as amended*, 82 Fed. Reg. 11,002 (Dep't Commerce Feb. 17, 2017) (amended final results of antidumping duty administrative review; 2014–2015) (collectively, "*Final Results*"); *see also* Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Welded Carbon Steel Standard Pipe and Tube Products from Turkey, A-489–501, (Dec. 12, 2016), *available at* https://enforcement.trade.gov/frn/summary/turkey/2016–30541–1.pdf (last visited May 29, 2018) ("Final I&D Memo"). This matter is before the

court on Rule 56.2 motions for judgment on the agency record filed by Tosçelik and Zekelman challenging various aspects of the Department's antidumping duty order. For the reasons discussed below, the court concludes that (1) Commerce's decision to calculate Tosçelik's duty drawback adjustment by allocating total exemptions over total cost of production is not in accordance with the law, (2) Commerce's decision to grant Tosçelik a circumstance of sale adjustment for warehousing expenses is not supported by substantial evidence, and (3) Commerce's decision to use actual weight instead of theoretical weight is supported by substantial evidence.

BACKGROUND

Commerce commenced an administrative review of the antidumping duty order on welded carbon steel standard pipe and tube products from Turkey at the request of domestic standard pipe producers, including JMC Steel Group ("JMC"), on July 1, 2015.[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 Fed. Reg. 37,588 (Dep't Commerce July 1, 2015) (notice of initiation of administrative review) ("*Initiation Notice*"); *see also* Letter from Schagrin Associates to Department of Commerce, PD 2, bar code 3280221–01 (May 29, 2015); Letter from Schagrin Associates to Department of Commerce, PD 4, bar code 3280623–01 (June 1, 2015). Commerce found that it would be impractical to examine all importers and producers, and therefore opted to examine companies accounting for the largest volume of the subject merchandise from Turkey during the investigation period. *See Initiation Notice*, 80 Fed. Reg. at 37,588. Tosçelik was one of the selected companies. *See id.* at 37,593.

Commerce published its preliminary results on June 13, 2016. *See Welded Carbon Steel Standard Pipe and Tube Products From Turkey*, 81 Fed. Reg. 38,131 (Dep't Commerce June 13, 2016) (preliminary results of antidumping duty administrative review, and partial rescission of review; 2014–2015) ("*Preliminary Results*"); *see also* Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Welded Carbon Steel Standard Pipe and Tube Products from Turkey; 2014–2015 Administrative Review, A-489–501, (June 6, 2016), *available at* https://enforcement.trade.gov/frn/summary/turkey/2016–13968–1.pdf (last visited May 29, 2018) ("Preliminary I&D Memo"). Pursuant to the

[1] Zekelman Industries was formerly known as JMC Steel Group. *See* Mot. Zekelman Industries J. Agency R. USCIT Rule 56.2 1, n.1, July 10, 2017, ECF No. 24; Letter from Schagrin Associates to Department of Commerce, PD 197, bar code 3537393–01 (Jan. 18, 2017). All references to JMC throughout the underlying administrative proceeding are to Zekelman.

Department's differential pricing analysis, Commerce used the average-to-average methodology to calculate dumping margins for both mandatory respondents. *See* Preliminary I&D Memo at 5–8. It assigned a 0.96 percent weighted-average dumping margin for Tosçelik. *Preliminary Results*, 81 Fed Reg. at 38,133. The Department preliminarily granted a duty drawback adjustment to Tosçelik due to the company's participation in Turkey's Inward Processing Regime. *See* Preliminary I&D Memo at 10. Commerce also preliminarily granted a circumstance of sale adjustment to Tosçelik. *See id.* at 14.

Following the preliminary determination, JMC filed an administrative case brief on July 27, 2016. *See* Administrative Case Brief of JMC Steel Group, PD 172, bar code 3491484–01 (July 27, 2016). JMC contested the Department's grant of a circumstance of sale adjustment to Tosçelik for warehousing expenses, as well as the Department's decision to use actual weight as opposed to theoretical weight for calculating the dumping margin. *See id.* at vi. Tosçelik submitted a rebuttal brief on August 9, 2016, which contested, in part, Commerce's methodology in calculating the duty drawback adjustment. *See* Tosçelik Rebuttal Brief at 6–28, PD 174, bar code 3495971–01 (Aug. 6, 2016).

Commerce issued its final determination on December 20, 2016. *See Welded Carbon Steel Standard Pipe and Tube Products From Turkey*, 81 Fed. Reg. 92,785 (Dep't Commerce Dec. 20, 2016) (final results of administrative review; 2014–2015). The Department assigned a weighted-average dumping margin of 1.91 percent to Tosçelik for the period of May 1, 2014 through April 30, 2015. *Id.* at 92,786. JMC subsequently submitted a ministerial error allegation. *See* Letter from Schagrin Associates to Department of Commerce, PD 188, bar code 3532690–01 (Dec. 27, 2016). Tosçelik filed comments in rebuttal to JMC's submission. *See* Letter from Law Offices of David L. Simon to Department of Commerce, PD 189, bar code 3533504–01 (Jan. 3, 2017). Commerce issued amended final results on February 17, 2017, in which it calculated a final weighted-average dumping margin of 3.40 percent for Tosçelik. *See Welded Carbon Steel Standard Pipe and Tube Products From Turkey*, 82 Fed. Reg. 11,002, 11,003 (Dep't Commerce Feb. 17, 2017) (amended final results of antidumping duty administrative review; 2014–2015).

Tosçelik commenced this action contesting Commerce's Final Determination on January 18, 2017, ECF No. 1, and filed its complaint on February 16, 2017, ECF No. 7. The court consolidated this action with *Zekelman Industries v. United States* on May 3, 2017. *See* Order, May 3, 2017, ECF No. 21.

Zekelman submitted a Rule 56.2 motion for judgment on the agency record, challenging Commerce's use of actual weight in calculating the weighted-average dumping margin and Commerce's grant of a circumstance of sale adjustment to Tosçelik for warehousing expenses. *See* Mot. Zekelman Industries J. Agency R. USCIT Rule 56.2, July 10, 2017, ECF No. 24 ("Zekelman's Mot."). Tosçelik filed a timely response. *See* Resp. Br. Pl. Tosçelik Profil ve Sac Tosçelik Profil ve Sac Endüstrisi A.Ş., Oct. 30, 2017, ECF No. 36. Zekelman filed a reply. *See* Consolidated Pl. Zekelman Industries' Reply Br. Supp. Mot. J. Agency R. Pursuant Rule 56.2, Nov. 29, 2017, ECF No. 43 ("Zekelman's Reply").

Tosçelik also filed a Rule 56.2 motion for judgment on the agency record, contesting the methodology Commerce utilized to calculate the amount of the duty drawback adjustment. *See* Mot. Pl. Tosçelik Profil ve Sac Endüstrisi A.Ş. J. Agency R. Pursuant Rule 56.2, July 10, 2017, ECF No. 25; *see also* Mem. Supp. Mot. Pl. Tosçelik Profil ve Sac Endüstrisi A.Ş. J. Agency R. Pursuant Rule 56.2, July 10, 2017, ECF No. 27 ("Pl.'s Mot."). Zekelman filed a response. *See* Def.-Intervenor Zekelman Industries' Resp. Pl.'s Mot. J Agency R., Oct. 30, 2017, ECF No. 38. Tosçelik filed a timely reply. *See* Reply Br. Pl. Tosçelik Profil ve Sac Endüstrisi A.Ş., Nov. 29, 2017, ECF No. 40.

Defendant submitted a consolidated response to both motions. *See* Def.'s Consolidated Resp. Opp'n Pl.'s & Consolidated Pl.'s Mots. J. Agency R., Oct. 30, 2017, ECF No. 39 ("Def.'s Br."). Pursuant to the two motions for judgment on the agency record, this court held oral argument on March 20, 2018. *See* Oral Argument, Mar. 20, 2018, ECF No. 55.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final determination in an antidumping duty investigation.[2] The court "shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

[2] All citations to the U.S. Code are to the 2012 edition. All further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code.

DISCUSSION

I. Tosçelik's Rule 56.2 Motion for Judgment on the Agency Record

A. Legal Standard for Duty Drawback Adjustment

The Tariff Act of 1930, as amended, directs Commerce to conduct antidumping duty investigations and determine whether goods are being sold at less-than-fair value. *See* 19 U.S.C. § 1673. If the Department finds that subject merchandise is being sold at less-than-fair value, and the U.S. International Trade Commission finds that these less-than-fair value imports materially injure a domestic industry, the Department issues an antidumping duty order imposing antidumping duties equivalent to "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id.* The Tariff Act defines export price as the price at which the subject merchandise is first sold in the United States, whereas the normal value represents the price at which the subject merchandise is sold in the exporting country.[3] *See id.* §§ 1677a(a), 1677b(a)(1)(B). The statute provides further guidance for determining export price as follows:

> (c) Adjustments for export price and constructed export price
>
> The price used to establish export price and constructed export price shall be—
>
> (1) increased by—
>
> (B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States.

Id. § 1677a(c)(1)(B). This calculation is known as a duty drawback adjustment.

The purpose of a duty drawback adjustment is to ensure a fair comparison between normal value and export price. *See Saha Thai Steel Pipe (Public) Co. Ltd. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011); *Torrington Co. v. United States*, 68 F.3d 1347, 1352–53 (Fed. Cir. 1995). Under a duty drawback program, a producer may receive an exemption or rebate from their home government for duties on imported inputs used to produce merchandise that is subse-

[3] Constructed export price is "the price at which the subject merchandise is first sold . . . in the United States . . . to a purchaser not affiliated with the producer or exporter." 19 U.S.C. § 1677a(b). For readability purposes, all discussion of export price in this opinion will also encompass constructed export price.

quently exported to the U.S. *See Saha Thai*, 635 F.3d at 1338. As a result, producers are still required to pay import duties for domestically-sold goods, which leads to an increase in normal value. *See id.* A duty drawback adjustment "corrects this imbalance, which could otherwise lead to an inaccurately high dumping margin, by increasing [export price] to the level it likely would be absent the duty drawback." *Id.*; *see also* S. Rep. No. 67–16, at 12 (1921).

Commerce applies a two-pronged test to determine whether a producer qualifies for a duty drawback adjustment. *See Saha Thai*, 635 F.3d at 1340. The respondent company must show "(1) that the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties, that the exemption is linked to the exportation of the subject merchandise, and (2) that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise." *Id.*

B. Commerce's Methodology for Calculating the Duty Drawback Adjustment

Commerce awarded Tosçelik a duty drawback adjustment due to the company's participation in Turkey's Inward Processing Regime. *See* Preliminary I&D Memo at 10. Tosçelik described the duty drawback scheme in the administrative proceedings as follows:

> Under Turkey's "Inward Processing Regime" (IPR), a company that imports raw materials and exports finished goods made from such raw materials may obtain an inward processing certificate (Turkish acronym, DIIB). A DIIB sets forth the quantity of raw material allowed to be imported without deposit of import duties under a given DIIB and the quantity of export required to close the DIIB, i.e., to satisfy the export commitment requirements of the DIIB. When a DIIB has been closed, and the closure is approved by Turkish customs, then the DIIB holder is released of any liability for import duties otherwise payable on the entries under the DIIB. The final approval of DIIB closures is within the jurisdiction of the Turkish Foreign Trade ministry; the process is generally completed 3 to 4 years after submission of a closed DIIB for approval.
>
> When a Turkish company imports or exports goods, it files an entry or exit declaration, respectively, with Turkish Customs. Customs verifies the accuracy of such import and export declarations and inserts the finalized quantities, values, and related information, including DIIB numbers, into a Customs database. A holder of a DIIB can then query the Turkish Customs database, via an internet e-portal, to ascertain the import and export

> movements under its DIIBs. DIIB holders can also download their DIIB usage tables from the Customs e-portal.

Section B–D Questionnaire Response of Tosçelik Profil ve Sac Endüstrisi A.Ş. at 29, PD 75–76, bar code 3400035–01 (Sept. 28, 2015). Both Plaintiff and Defendant agree that the duty drawback adjustment was properly granted here. The issue in dispute is whether Commerce reasonably calculated the duty drawback adjustment for Tosçelik.

The Department made its calculation by reducing the duty drawback adjustment to Tosçelik's U.S. sales and allocating the duty exemptions and rebates claimed over the total quantity of production using that input. *See* Def.'s Br. 12–13. Defendant describes the calculation used by Commerce in the following equation:

$$\frac{\text{Input cost + rebated or forgiven duties}}{\text{Quantity of all production using that input}} = \text{Per unit cost of the input, including its duty burden}$$

Id. at 13. Tosçelik argues that the Department's calculation is inconsistent with the statute and the agency's practice of computing exempted and rebated duties over total exports to the U.S. *See* Pl.'s Mot. 17, 19. Because the statute contemplates a drawback on duties that are rebated or exempted "by reason of" the exportation of the subject merchandise to the United States, Tosçelik contends that Commerce's calculation of the duty drawback adjustment is contrary to the statute's plain language in that the chosen methodology ignores the statute's textual linkage between the adjustment and the act of exporting. *See id.* at 19. For the following reasons, the court finds that Commerce calculated the amount of duty drawback adjustment not in accordance with the law.

Under its previous practice, Commerce divided the amount rebated or forgiven by the exported quantity to determine the duty burden borne by each unit of merchandise sold in the United States. *See* Def.'s Br. 13. This "per unit" amount was then added to the export price. *See id.* Commerce changed its practice in this case, and employed a "duty neutral" approach when calculating Tosçelik's duty drawback adjustment. *See* Final I&D Memo at 5. Commerce stated that it

> continue[d] to find in these final results that where duty drawback inputs are sourced from both domestic (Turkish) and foreign [Non-Turkish] sources, a calculation of duty drawback which is based on export volume results in an imbalance in the comparison of export price (EP) or constructed export price (CEP) with NV [normal value]. . . . [T]his imbalance exists

> because the NV portion of the comparison reflects an average annual cost that reflects both foreign sourced inputs (which incur duties) and domestic inputs for which the Respondent incurs no duties. In contrast, on the EP/CEP side, the duty drawback adjustment to the USP [U.S. Price] employs a smaller denominator than that used on the NV side. As in *Rebar Trade*, we maintain that the combination of duties included within NV relative to what is included within USP, results in a larger per-unit U.S. sales adjustment than is imbedded within NV. This creates an imbalance in the comparison of the USP to NV.

Id. (footnotes omitted). As a result of these findings, the Department "based [its] duty drawback calculation on the per-unit costs" within the cost of production database submitted by Tosçelik. *Id.* at 6.

Defendant contends that Commerce's methodology is consistent with precedent, specifically *Saha Thai*. *See* Def.'s Br. 15. Defendant argues that the "matching principle" illustrated in *Saha Thai* instructs Commerce that export price, cost of production, and constructed value "should all be increased together, or not at all." *Id.* at 19 (citing *Saha Thai*, 635 F.3d at 1342–43). The court disagrees with Defendant's reading of the case. The duty drawback regime at issue in *Saha Thai* was one based solely on exemptions. Because the duties in *Saha Thai* were exempted, they were not recorded in the respondent company's books as an expense incurred. Commerce therefore increased the company's cost of production ("COP") and constructed value ("CV"), which are both part of the Department's normal value calculation, to account for the duties presumably paid on inputs for products sold in the domestic market. The Court of Appeals for the Federal Circuit recognized that:

> [T]he entire purpose of increasing EP is to account for the fact that the import duty costs are reflected in NV (home market sales prices) but not in EP (sales prices in the United States). An import duty exemption granted only for exported merchandise has no effect on home market sales prices, so the duty exemption should have no effect on NV. Thus, because COP and CV are used in the NV calculation, COP and CV should be calculated as if there had been no import duty exemption. It would be illogical to increase EP to account for import duties that are purportedly reflected in NV, while simultaneously calculating NV based on a COP and CV that do not reflect those import duties. Under the "matching principle," EP, COP, and CV should be increased together, or not at all.

Saha Thai, 635 F.3d at 1342–43. Because Commerce adjusted EP in the *Saha Thai* case to account for the duty drawback adjustment

received by the respondent company, the Court of Appeals for the Federal Circuit concluded that the subsequent adjustment to NV to reflect the duties paid on inputs for products sold in the home market was proper. The "matching principle" relates, therefore, to an adjustment to normal value with respect to the particular facts and recordkeeping practices presented in *Saha Thai*, and should not be expanded to encompass all duty drawback adjustment calculations made by Commerce. Here, the Parties do not allege deficiencies in Tosçelik's recordkeeping or in the normal value calculation with respect to duty drawback to warrant application of the matching principle. When viewed in this context, *Saha Thai*'s matching principle does not support Commerce's methodology in the instant matter before this court.

Defendant argues further that Commerce's methodology is permitted under 19 U.S.C. § 1677a(c)(1)(B). *See* Def.'s Br. 15. The statute allows for an upward adjustment to EP by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(1)(B). Commerce's calculation in this case is inconsistent with the statute because allocating duty drawback to total production encompasses home market (Turkish) sales, which could not earn a duty drawback, and fails to adequately connect the adjustment to duties forgiven "by reason of" the products' exportation to the United States. By including costs associated with manufacturing goods sold in the domestic market, the Department's methodology lessens the upwards adjustment and conceptually reintroduces an imbalance in the dumping margin calculation. Commerce's method of calculating Tosçelik's duty drawback adjustment with respect to total production is inconsistent with and contravenes the plain language of 19 U.S.C. § 1677a(c)(1)(B). The court rejects Defendant's argument and concludes that Commerce's action is unreasonable and is not in accordance with the law, and remands Commerce's determination for further administrative proceedings consistent with this opinion.

II. Zekelman's Rule 56.2 Motion for Judgment on the Agency Record

A. Commerce's Use of Actual Weight as Opposed to Theoretical Weight

When calculating Tosçelik's antidumping margin, Commerce utilized actual weight as opposed to theoretical weight, which is an estimated weight based on the products' dimensions. *See* Final I&D Memo at 19. Zekelman argues that Commerce should have either

requested that Tosçelik provide information on the basis of theoretical weight or converted Tosçelik's information into theoretical weight. *See* Zekelman's Mot. 12–16. Zekelman further contends that Commerce's failure to explain why it did not take either action alone warrants a remand on this issue. *See id.* at 16.

Contrary to Zekelman's arguments, the record supports the Department's decision. Commerce's questionnaire did not specify whether respondents should provide information in either actual or theoretical weight, but rather that respondents should use the "same unit of measure" to report sales. *See* Section B–D Questionnaire Response of Tosçelik Profil ve Sac Endüstrisi A.Ş. at 61, PD 75–76, bar code 3400035–01 (Sept. 28, 2015). Tosçelik prepared all databases for the Department on an actual-weight basis. *See id.* at 62. In its supplemental questionnaire response, Tosçelik explained to the Department its belief that the use of theoretical weight in this case may introduce unwanted distortions into the calculations. *See* Supplemental Questionnaire Response of Tosçelik Profil ve Sac Endüstrisi A.Ş. at 5–7, PD 115, bar code 3546873–01 (Mar. 28, 2016). Although Commerce recognized that it may consider utilizing only theoretical weight in future reviews, it explained that it would continue to use actual weight in the instant review because the respondent provided data in actual weight and had done so in previous administrative reviews. *See* Final I&D Memo at 19. Based on the information available in the record, it was reasonable for Commerce to calculate Tosçelik's antidumping margin on an actual-weight basis. The court concludes that the Department's decision to calculate Tosçelik's antidumping margin on an actual-weight basis is supported by substantial evidence.

B. Commerce's Grant of a Circumstance of Sale Adjustment for Warehousing Expenses to Tosçelik

Commerce granted Tosçelik a circumstance of sale adjustment for Tosçelik's warehousing expenses. Zekelman argues that Commerce's decision was unsupported by substantial evidence because Commerce failed to address contrary evidence on the record allegedly showing that Tosçelik overstated its warehousing expenses in its questionnaire responses. *See* Zekelman's Mot. 16–20. Zekelman contends further that Tosçelik's refusal to provide information relating to its warehousing expenses should have prompted the Department to apply facts otherwise available with an adverse inference under 19 U.S.C. § 1677e. *See id.* at 18–20. Zekelman requests that the court remand this issue so the Department can conduct a proper analysis. *See* Zekelman's Reply 5. The Government defends Commerce's grant

of an adjustment. *See* Def.'s Br. 25–27. For the following reasons, the court concludes that Commerce's decision to grant Tosçelik an adjustment for warehousing expenses was unsupported by substantial evidence.

As stated before, in an antidumping duty calculation, normal value represents the price at which the subject merchandise is sold in the exporting country. *See* 19 U.S.C. § 1677b(a)(1)(A). When determining the appropriate price for comparison, Commerce may make certain price adjustments. *See id.* § 1677b(a)(6). The price may be

> (C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to—
>
> (iii) other differences in the circumstances of sale.

Id. § 1677b(a)(6)(C)(iii).

Section 776 of the Tariff Act provides that if "necessary information is not available on the record" or if a respondent "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," then the agency shall "use the facts otherwise available in reaching" its determination. *Id.* §§ 1677e(a)(1), (a)(2)(B). If the Department further finds that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information" from the agency, then the Department "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.* § 1677e(b)(1)(A). The Court of Appeals of the Federal Circuit has interpreted these two subsections to have different purposes. *See Mueller Comercial de Mexico, S. de R.K. De C.V. v. United States*, 753 F.3d 1227, 1232 (Fed. Cir. 2014). Subsection (a) applies "whether or not any party has failed to cooperate fully with the agency in its inquiry." *Id.* (citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011)). On the other hand, subsection (b) applies only when the Department makes a separate determination that the respondent failed to cooperate "by not acting to the best of its ability." *Id.* (quoting *Nippon Steel v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003)).

The law clearly requires Commerce to explain the basis for its decisions. *See, e.g., NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) ("[W]hile its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court."). With respect to antidumping du-

ties cases specifically, "a final determination by Commerce must include 'an explanation of the basis for its determination that addresses relevant arguments[] made by interested parties who are parties to the investigation or review.'" *Id.* at 1320 (quoting 19 U.S.C. § 1677f(i)(3)(A)).

Tosçelik indicated in its questionnaire response that the company owns and operates two steel service centers. *See* Section B–D Questionnaire Response of Tosçelik Profil ve Sac Endüstrisi A.Ş. at 29, PD 75–76, bar code 3400035–01 (Sept. 28, 2015). "The main function of these service centers is to provide cut-to-length (CTL) services for conversion of coils to sheets. However, Tosçelik also uses these service centers for warehousing pipes for delivery to customers in the vicinity of the service centers. Tosçelik books all the expenses of these service centers in the respective cost center for each location." *Id.* The company provided worksheets demonstrating the costs of operating each warehouse. *See* Exhibit 4 of Section B–D Questionnaire Response of Tosçelik Profil ve Sac Endüstrisi A.Ş., CD 62–64, bar code 3400032–01 (Sept. 28, 2015). Commerce issued a supplemental questionnaire, asking the respondent to "re-calculate [its] claimed warehousing expenses," ensuring "that all expenses incurred in [its] warehousing claim are directly related to warehousing functions." Supplemental Questionnaire Response of TosçelikProfil ve Sac Endüstrisi A.Ş. at 13, PD 115, bar code 3452802–01 (Mar. 28, 2016). Tosçelik responded that because each location is "a single cost center, it is not possible to separate the warehousing expense from the other expenses of the operations." *Id.* The company resubmitted its worksheets after removing the "one expense in the warehouse that is solely attributable to the CTL activities carried out . . . namely, the scrap generated." *Id.* at 14.

Commerce's preliminary determination simply stated that the Department made adjustments for differences in circumstances of sale by "deducting direct selling expenses incurred on home market sales and adding U.S. direct selling expenses to [normal value]." Preliminary I&D Memo at 14–15. "Direct selling expenses consisted of credit expenses, warranty expenses, and factoring expenses." *Id.* at 15. The preliminary determination made no mention of Tosçelik's warehousing expenses.

Commerce's final determination briefly responded to comments concerned with Tosçelik's warehousing expenses. That section reads, in full:

> We agree with Toscelik. In the *Preliminary Results*, we made a circumstances of sale adjustment for Toscelik's reported warehousing expenses, in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410.
>
> In reviewing Toscelik's reported warehousing expenses, we find no evidence suggesting that Toscelik's claimed expenses relate to activities other than warehousing, or that Toscelik's reported warehousing expenses are overstated. Therefore, in these final results, pursuant to section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410, we have made no changes from our *Preliminary Results*, and we have continued to make a circumstances of sale adjustment for Toscelik's warehousing expenses.

Final I&D Memo at 22 (footnotes omitted). The Department's proclamation of "no evidence" clearly contradicts Tosçelik's admission that the claimed warehousing expenses encompassed costs associated with both manufacturing and storing products for sale. The Department failed to give reasons and substantiate its decision to make a circumstance of sales adjustment for Tosçelik. Accordingly, the court remands Commerce's final determination on this issue. On remand, Commerce should adequately address contrary evidence on the record and provide clear and discernable reasons for its decision.

CONCLUSION

For the foregoing reasons, the court concludes that Commerce impermissibly calculated Tosçelik's duty drawback adjustment, and that Commerce's methodology was not in accordance with the law. Tosçelik's Rule 56.2 motion for judgment upon the agency record is granted. On remand, the Department should recalculate Tosçelik's duty drawback adjustment using a methodology that is consistent with this opinion.

The court concludes further that Commerce's decision to grant Tosçelik a circumstance of sale adjustment for warehousing expenses is not supported by substantial evidence, but upholds Commerce's use of actual weight as opposed to theoretical weight when calculating Tosçelik's weighted-average dumping margin as supported by substantial evidence. Zekelman's Rule 56.2 motion for judgment upon the agency record is granted with respect to the issue of circumstances of sale adjustment and denied with respect to the issue of actual weight. On remand, Commerce should reexamine the circumstance of sale adjustment granted to Tosçelik consistent with this opinion.

Accordingly, it is hereby

ORDERED that Tosçelik's Rule 56.2 motion for judgment on the agency record is granted; and it is further

ORDERED that Zekelman's Rule 56.2 motion for judgment on the agency record is granted in part with respect to the Commerce's grant of a circumstance of sale adjustment for warehousing expenses to Tosçelik; and it is further

ORDERED that Zekelman's Rule 56.2 motion for judgment on the agency record is denied in part with respect to Commerce's use of actual weight when calculating Tosçelik's weighted-average dumping margin; and it is further

ORDERED that the *Final Results* are remanded to the U.S. Department of Commerce for further proceedings consistent with this opinion; and it is further

ORDERED that the U.S. Department of Commerce shall file its remand redetermination on or before September 4, 2018; and it is further

ORDERED that the U.S. Department of Commerce shall file the administrative record on or before September 18, 2018; and it is further

ORDERED that the Parties shall file any comments on the remand redetermination on or before October 4, 2018; and it is further

ORDERED that the Parties shall file any replies to the comments on or before November 5, 2018; and it is further

ORDERED that the joint appendix shall be filed on or before November 13, 2018.

Dated: June 6, 2018
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE